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Comments on Interim Rule on Encryption Items Transferred From the U.S. Munitions List to the Commerce Control List

The ACLU is a nonpartisan organization with 275,000 members nationwide and affiliates in every state, whose sole purpose is to defend and enhance the principles of freedom and liberty embodied in the United States Constitution. Supporting the First Amendment right of free speech is a crucial part of our mission.

We believe the new Interim Rule on Encryption Items Transferred From the U.S. Munitions List to the Commerce Control List (December 30, 1996, 61 FR 68572) to be an irreparable infringement on First Amendment rights. Export restrictions on cryptography are a prior restraint on protected speech, and are a content based gag on Constitutionally protected speech. Prior restraints on speech and attempts to regulate speech based on content are anathema to the Constitution, and thus we urge the removal of encryption products from the export restrictions altogether.

The new regulations are functionally equivalent to the prior regulatory scheme which was held to be unconstitutional on December 16, 1996, in Bernstein v. Department of State in the District Court for the Northern District of California in a ruling by Judge Marilyn Hall Patel.

With respect to cryptography, Judge Patel found the International Traffic in Arms Regulations (ITAR) to be "... a paradigm of standardless discretion".

The rules under the Export Administration Regulations (EAR) are no better. There are still no adequate controls on the licensors - rather they are to review the materials on a "case-by-case" basis. While EAR does have procedural safeguards that were lacking under ITAR, cryptography is exempted from most of them. The same "lack of constraints on approving or denying a license" the Federal Court cited still apply.

While there are national security concerns raised by the government, those concerns are not sufficient to create grounds for a prior restraint on speech. The decision of the Federal Court stressed that the holdings in the Pentagon Papers case are applicable to cryptography. The Supreme Court has set an extremely exacting standard for determining when national security can be a valid reason for lifting the constitutional bar on prior restraints, and the court found ITAR's vague national security language to be "clearly insufficient." That holding applies directly to the

national security concerns behind the new regulation as well.

In referring to the Snuffle encryption algorithm, the decision of the Federal Court stated that:

Software relating to encryption is simply a topic of speech employed by some scientists involved in applied research. Hence, Snuffle is speech afforded the full protection of the First Amendment not because it enables encryption, but because it is itself speech.

The Free Speech Guarantee of the United States Constitution, with or without the stunningly clear Federal Court ruling, provides encryption the same protection as other speech. The proposed regulations restrict that speech and are unconstitutional. To contort legislative authority in an unrelated subject area in order to violate the nation's fundamental law is never acceptable, but to do so on the heels of the Federal Court decision affirming constitutional protections for encryption is both authoritarian and utterly lawless.

In 1991 the Supreme Court reaffirmed its 1984 declaration that "[r]egulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 112 S.Ct. 501 (1991). While bans on encryption exports have been called content neutral, they do in fact block speech due to its cryptographic content. The Federal Court's decision stated that "the very nature of the technology blurs the distinction between these two ways of understanding the constitutionality of a regulation," noting that the stronger an encryption scheme is the more noteworthy it is as academic speech.

The Federal Court's decision stresses the expressive value of cryptography, and the unconstitutionality of the licensing scheme applied to this speech. While the ruling applies to the prior cryptography licensing scheme, the First Amendment issues are not significantly altered under the new arrangement. The provisions requiring the prior licensing of speech remain as unconstitutional with the Commerce Department as the licensing authority as they did when the State Department made licensing decisions.

The ACLU urges that the cryptography export licensing rules be rescinded. Modification of the scheme is not sufficient to remove the First Amendment infringements. Encryption is speech, and as such is entitled to protection. The licensing regulations are unconstitutional, and need to be removed.

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